# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CIVIL APPLICATION No. 21329 of 2006
**With**
**SPECIAL CIVIL APPLICATION No. 21330 of 2006**
**To**
## SPECIAL CIVIL APPLICATION No. 21332 of 2006

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE JAYANT PATEL**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**KANJIBHAI DHAYABHAI MALSATTAR & 3 - Petitioner(s)**
**Versus**
**ANJAR AREA DEVELOPMENT AUTHORITY - Respondent(s)**

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**Appearance :**
MR NV ANJARIA for Petitioner(s) : 1 - 4.
NOTICE SERVED for Respondent(s) : 1,
MR NIKHILESH J SHAH for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL**

**Date : 27/02/2007**

**ORAL JUDGMENT**

1. Rule. Mr. Nikhilesh Shah, learned counsel waives service of notice for respondent No.1. With the consent of learned advocates appearing for both the sides, matter is finally heard today.

2. All the petitions are preferred by the petitioners for relief inter alia to quash and set aside the decision dated 08.02.2006, Annexure-C, taken by the respondent authority and to direct the respondent Area Development Authority to allot the petitioners with alternative site in Final Plot No. 554 or No. 601 in Town Town Planning Scheme No. 4. The petitioners have further prayed to issue appropriate writ to the respondent authority to allot each of the petitioners for allotment of shops in complex constructed on the Final Plot No. 602 on priority basis and in view of the directions and observations of the Division Bench in Letters Patent Appeal No. 1073 of 2004. The petitioners have also prayed to direct the respondent Area Development Authority to treat each of the petitioners entitled for allotment of suitable area on the land bearing Final Plot No. 601 and/or on the Final Plot No. 554 for setting up of their lost shops on priority basis and in view of the directions and observations of the Division Bench of this Court in Letters Patent Appeal No. 1073 of 2004.

3. Heard Mr. Anjaria, for the petitioners and Mr. Shah for the respondents.

4. It appears that there is no dispute on the aspects that earlier, the petitioners were alloted land as lessee by the Municipality and, in the capacity as lessee the petitioners and the land have constructed shops. The said area over which the shops were constructed by the petitioners and the land belonging to the Municipality came to be included in the Scheme and consequently, the shops which were constructed by the petitioners earlier, were to be demolished and at that stage, the petitioners preferred Special Civil Application No. 14579 of 2003 and allied matters, which came to be disposed of by this Court (Coram:M.R.Shah, J.) on 10.03.2005.

5. As per the view taken by this Court in the above decision, the Court observed inter alia that the petitioners cannot be said as owner and further observed that the lease period had expired after 01.04.2002, and the scheme came into force thereafter. However, on the aspects of compensation for the loss of the superstructure etc., it was observed by the Court that the petitioners have remedy to approach before the Town Planning Officer for the purpose of determining the compensation, if any. It appears that the petitioners did carry the

matter before the LPA Bench against the said decision of the Single Bench of this Court being Letters Patent Appeal No. 1073 of 2004 and others in Special Civil Application No. 14579 of 2003 & Ors. and there is also no dispute on the point that before any protective order was passed by the Division Bench in the aforesaid Letters Patent Appeal, the superstructure or the shops which were constructed by the petitioners came to be demolished by the concerned authority by way of implementation of the Scheme. When the Letters Patent Appeal came to be considered by the Division Bench of this Court on 05.08.2005, since the shops were already demolished, it was observed by the Division Bench as under:

> "Hence, without going into the merits of the appellants' challenge to the order of the learned Single Judge, we dispose of the appeal with the direction that if the appellants make representation for allotment of alternate site or payment of compensation in terms of the provisions of the Gujarat Town Planning and Urban Development Act, 1976 and the rules framed thereunder within a period of one month from today, then the Town Planning Officer/Area Development Authority shall consider and decide the same within next two months by passing a speaking order. While doing so, the concerned authority/officer shall not be influenced by the fact that the writ petition filed by the appellants has been dismissed by the learned Single Judge."

6. It appears that the petitioners thereafter, did make representation pursuant to the order of the Division Bench and the said representation of the petitioners have been decided vide order dated 08.02.2006, which is impugned in the petition, whereby, the respondent authority communicated to the petitioners that since the land was not belonging to the petitioners in the Town Planning Scheme, and the Town Planning Officer has not alloted final plot nor compensation for such property is assessed and therefore, no compensation can be given. It is under these circumstances, the present petition.

7. It further appears that there is no dispute on the aspect that the respondent authority has constructed a shopping center over the major portion of the land, which originally belonged to the Municipality and over which the petitioners had made construction of the shops as a part of the implementation of the Town Planning Scheme.

8. It appears from the affidavit-in-reply filed by the respondent authority that for the purpose of construction of shopping center, as per the agreement with the contractor concerned, the first floor shops are to be retained by the contractor but the ground floor shops are to be allotted by the respondent authority as per the

prevailing policy framed by the Government for the purpose of allotment of shops and plots and also its adoption by the respondent Authority.

9. Therefore, under these circumstances, the additional prayers for allotment of the shopping center or for considering the case on priority basis for the allotment of the shops are made by present petitioners by brining about the amendment.

10. It is not in dispute that as per the prevailing policy of the respondent Authority, the owners/tenants who are affected by the Town Planning Scheme are to be considered for priority. However, it was submitted by Mr. Shah, learned counsel for the respondent that earlier, wider meaning was given for including various persons in the definition of owner/tenant also by including the other earthquake affected persons also. However, he submitted that in view of the decision of the Apex Court in the case of Doshi Dharmesh Shivlal Vs. Kaushik B. Thanki & Ors. in Civil Appeal No. 6922 of 2005, decided on 18.11.2005, the restricted meaning is required to be given and in the submission of Mr. Shah, in that case, though this Court had included the Manager of the owner as affected by the earthquake, by giving extended meaning of the owner/tenant, the Apex Court found that such extended meaning could not have been given and ultimately, the decision of this Court is set

aside. Therefore, he submitted that in view of the decision of the Apex Court, the petitioners cannot be said as included in the definition of the word “landlord/tenant” on priority basis for such purpose of allotment of the shops in the shopping center.

11. Whereas, Mr. Anjaria, learned counsel appearing for the petitioners contended that as such, it was a case before the Apex Court for considering the matter at the stage after the auction and the persons concerned, whose case was considered by the Apex Court was not the lessee or holding the ownership of the superstructure, which has been demolished in the Town Planning Scheme. Therefore, he submitted that the decision may not apply to the facts of the present case and this Court may hold that the petitioners are affected by the Town Planning Scheme and therefore, entitled to the priority for the allotment of the shops in the shopping center as and when the process is undertaken by the respondent Authority.

12. The perusal of the decision of the Apex Court shows that in that case, after the auction was finalised, the decision of the respondent authority was challenged on the ground that it was departure from the condition of the offer made for giving priority. The Apex Court did consider the matter on the ground that in the

public notice, the preference was to be given to certain class of persons who were affected by the Town Planning Scheme and the Court further found that the occupants in capacity as Manager would not be on the same footing as occupant in capacity as the owner of the land.

13.Mr. Anjaria is right in submitting that the present case of the petitioners were not in capacity as the employee of the owner as it was considered by the Apex Court in the said decision. Nor the present case is at a stage where after the auction is completed by express stipulation, the departure is to considered by the authority for giving priority. However, as regards the status of the petitioners in the capacity as owner is concerned, they cannot be said as owner of the said land. On the aspects of owner of the superstructure is concerned, earlier, as per the decision of this Court dated 10.03.2005, and more particularly, the observations made at para 14.1 in the said decision, this Court did observe that after the expiry of the period of lease, the petitioners were required to vacate the premises and take away the superstructure and it further observed that the petitioners cannot be considered to be owner of the land being the owner of the superstructure.

14.However, the Division Bench of this Court while

relegating the petitioners to make the representation on account of the demolition already made prior to the passing of the order dated 05.08.2005, did direct that while considering the representation, the concerned authority/officer shall not be influenced by the fact that the writ petition filed by the appellants(petitioners herein) has been dismissed by the learned Single Judge. Therefore, it was required for the respondent authority to consider the matter independently on the aspects of the superstructure constructed and owned by the petitioners, which has been demolished by way of implementation of the Town Planning Scheme. Further, even on the aspects of entitlement of the compensation, as such, this Court as per the above referred decision dated 10.03.2005 did not conclude such issue arising in the present case now and even if such observations on the aspects of compensations are kept aside in view of the subsequent order of the Division Bench dated 05.08.2005, it was required for the respondent authority to consider the effect of implementation of the Scheme by examining as to whether any damage is caused to the petitioners or not?

15. If the petitioners are the persons who had lawfully constructed superstructure and the said area of the land was included in the scheme and as a result thereof, the land together with the

superstructure is taken over in the scheme and consequently, the superstructure is also demolished, it cannot be concluded that the petitioners are not at all affected by the Town Planning Scheme or the implementation of the Town Planning Scheme. As such, it will be for the respondent authority to reconsider the matter afresh and if ultimately found that the petitioners are affected by the Town Planning Scheme or its implementation, not in the capacity as the owner of the land, but in the capacity as owner of the superstructure lawfully constructed and continued after the expiry of the period of lease, then it will be required for the respondent authority to examine and consider as to whether the petitioners would be entitled to the benefit of the priority as per the prevailing policy of the authority or not?

16. As such, at present, as there is no action taken for disposal of the shops in the shopping center nor the question of priority has been considered by the respondent authority, it would be for the respondent authority to consider the matter and to take appropriate decision, in any case, prior to the process undertaken for allotment of shops.

17. In view of the above, respondent authority is directed to consider the matter for examining the aspects of priority qua the cases of the

petitioners and take appropriate decision, preferably within a period of two months from the receipt of the order, and in any case, at least two weeks prior to the date of publication of the notice for inviting the offers for allotment of the shops in the shopping center. While considering the matter, the respondent authority shall take into consideration the observations made by this Court in the present order.

18. Petition is partly allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, there shall be no order as to costs.

***(JAYANT PATEL, J.)***

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